

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LUIS COLOM,

Plaintiff,

v.

WELLS FARGO HOME MORTGAGE, INC.,

Defendant.

No. C-14-2410 MMC

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS AMENDED
COMPLAINT; DISMISSING AMENDED
COMPLAINT WITH LEAVE TO AMEND**

Before the Court is defendant Wells Fargo Home Mortgage, Inc.'s "Motion to Dismiss Complaint," filed August 22, 2014, by which defendant seeks an order dismissing plaintiff's First Amended Complaint ("FAC") in its entirety. Plaintiff Luis Colom has filed opposition, to which defendant has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.¹

1. First Cause of Action ("Violations of California Civil Code § 2923.6(f)")

a. To the extent the First Cause of Action is based on a claim that defendant violated § 2923.6(f)(3), it is subject to dismissal. Although plaintiff alleges the April 16, 2014 email denying his application for a loan modification did not include the "Net Present Value . . . calculations used" by defendant (see FAC ¶ 56), such information is required only where a "denial is the result of a net present value calculation," see Cal. Civ. Code

¹By order filed September 23, 2014, the Court took the matter under submission.

§ 2923.6(f)(3), and plaintiff does not allege he was denied a modification for that reason.

b. To the extent the First Cause of Action is based on a claim that defendant violated § 2923.6(f)(5), see Cal. Civ. Code § 2923.6(f)(5) (providing that after denial of application, mortgage servicer shall send, “[i]f applicable, a description of other foreclosure prevention alternatives”), it is subject to dismissal. Although plaintiff alleges the above-referenced denial did not include a “list of other possible foreclosure alternatives” (see FAC ¶ 56), plaintiff fails to allege any facts to support a finding that such omission constituted a material violation of § 2923.6(f).² Plaintiff has not alleged, for example, that in connection with the subject denial, he was not otherwise given a document providing notice of other foreclosure prevention alternatives. See Cal. Civ. Code § 2924(a)(1) (providing, as to § 2923.6, where “trustee’s deed upon sale has not been recorded,” borrower limited to “bring[ing] an action for injunctive relief to enjoin a material violation”).³

2. Second Cause of Action (Violations of California Civil Code §§ 2923.7(b) and (c))

a. To the extent the Second Cause of Action is based on a claim that defendant violated § 2923.7(b)(1), it is subject to dismissal, as plaintiff does not allege defendant’s “single point of contact” (“SPOC”) failed to advise plaintiff with respect to any part of “the process” or any “deadline” for required submissions. See Cal. Civ. Code § 2923.7(b)(1) (providing SPOC is “responsible for . . . [c]ommunicating the process by which a borrower may apply for an available foreclosure prevention alternative and the deadline for any required submissions”).

b. To the extent the Second Cause of Action is based on a claim that defendant violated § 2923.7(b)(2), it is subject to dismissal, as plaintiff does not allege the SPOC

²Defendant requests the Court take judicial notice of three other documents it assertedly sent to plaintiff in which it identified alternatives. (See Def.’s Req. for Judicial Notice Exs. T-V.) The FAC, however, does not refer to such documents, nor do those documents form the basis for plaintiff’s claims, and, accordingly, the request is hereby DENIED. See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (holding courts may take judicial notice of document not attached to complaint where “plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s claim”).

³Given that the FAC seeks an order prohibiting a foreclosure on plaintiff’s property (see FAC, Prayer for Relief ¶ 2), it would appear a sale of the property has not occurred.

1 failed to notify plaintiff that he needed to submit further documentation. See Cal. Civ. Code
 2 § 2923.7(b)(2) (providing SPOC is “responsible for . . . notifying the borrower of any
 3 missing documents necessary to complete the application”).

4 c. To the extent the Second Cause of Action is based on a claim that defendant
 5 violated § 2923.7(b)(3), it is subject to dismissal. Even assuming the SPOC’s failure to
 6 return some of plaintiff’s phone calls and emails during the pendency of the application (see
 7 FAC ¶¶ 37-43, 55-56) constituted a failure to “timely . . . inform the borrower of the current
 8 status” of the application, see Cal. Civ. Code § 2923.7(b)(3), plaintiff fails to allege any facts
 9 to support a finding that any such failure constituted a “material” violation of
 10 § 2923.7(b)(3). Further, plaintiff fails to allege any facts to support a finding that his claim is
 11 not moot, given plaintiff was ultimately informed of the status of the application, i.e., that it
 12 was denied. See Cal. Civ. Code § 2924.12(a)(1) (providing, where “trustee’s deed upon
 13 sale has not been recorded,” borrower’s relief limited to “injunctive relief to enjoin a material
 14 violation of Section . . . 2923.7”).

15 d. To the extent the Second Cause of Action is based on a claim that defendant
 16 violated § 2923.7(b)(4), it is subject to dismissal, as plaintiff does not allege any facts to
 17 support a finding that the SPOC failed to consider plaintiff for other foreclosure alternatives
 18 offered by or through defendant. See Cal. Civ. Code § 2923.7(b)(4) (providing SPOC is
 19 “responsible for . . . [e]nsuring that a borrower is considered for all foreclosure prevention
 20 alternatives offered by, or through, the mortgage servicer, if any”).

21 e. To the extent the Second Cause of Action is based on a claim that defendant
 22 violated § 2923.7(c), it is subject to dismissal. Although plaintiff alleges defendant
 23 “transferred [p]laintiff’s file” from one SPOC to another on October 31, 2013 (see FAC
 24 ¶¶ 28, 33, 83); Cal. Civ. Code § 2923.7(c) (providing SPOC “shall remain assigned to the
 25 borrower’s account until . . . all loss mitigation options . . . have been exhausted”), and,
 26 even assuming, arguendo, § 2923.7(c) precludes such a reassignment, § 2923.7(c) was
 27 not applicable to plaintiff on said date, given that he had at such time a Chapter 13 petition
 28 pending in bankruptcy court, see Cal. Civ. Code § 2920.5(c)(2)(C) (providing “borrower,” for

purposes of § 2723.7, does not include “individual who has filed a case under Chapter . . .
13 . . . and the bankruptcy court has not entered an order closing or dismissing the case”).⁴

3. Third Cause of Action (“Violations of California Business & Professions Code
§ 17200 *et seq.*”)

a. To the extent the Third Cause of Action is based on alleged violations of
§§ 2923.6(f)(3), 2923.7(b)(1), 2923.7(b)(2), 2923.7(b)(4), and 2923.7(c), it is subject to
dismissal for the reasons set forth above.

b. To the extent the Third Cause of Action is based on alleged violations of
§§ 2923.6(f)(5) and 2923.7(b)(3), it is subject to dismissal for the reasons set forth above,
and because plaintiff fails to allege that, as a result of any such violation, defendant has
obtained any property from plaintiff. See Korea Supply Co. v. Lockheed Martin Corp., 29
Cal. 4th 1134, 1446 (2003) (holding remedies under § 17200 are limited to injunctive relief
and restitution).

4. Fourth Cause of Action (“Negligence”)

a. To the extent the Fourth Cause of Action is based on a claim that defendant
failed to “timely communicate with [p]laintiff” (see FAC ¶ 124), it is subject to dismissal.
Even assuming defendant owed plaintiff a duty to exercise “reasonable care in the
processing of a loan modification,” plaintiff fails to allege sufficient facts to support a finding
that any delay in communicating defendant’s decision caused plaintiff injury. Cf. Alvarez v.
BAC Home Loan Servicing, L.P., 228 Cal. App. 4th 941, 948-951 (2014) (holding, where
lender “agree[s] to consider modification of the plaintiffs’ loans,” lender has “duty to use
reasonable care in the processing of a loan modification”; finding plaintiffs sufficiently stated
claim for negligence, where plaintiffs alleged “delay in processing deprived them of the

⁴Defendant’s unopposed request that the Court take judicial notice of the bankruptcy
proceedings filed by plaintiff on October 28, 2013 and dismissed by the bankruptcy court on
November 18, 2013 (see Def.’s Req. for Judicial Notice Ex. Q), is hereby GRANTED. See
Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001) (holding, for purposes of
motion to dismiss under Rule 12(b)(6), “court may take judicial notice of matters of public
record”) (internal quotation and citation omitted); Jones v. City of Cincinnati, 521 F.3d 555,
562 (6th Cir. 2008) (holding “court may consider public records without converting a Rule
12(b)(6) motion into a Rule 56 motion”).

1 opportunity to seek relief elsewhere”).

2 b. To the extent the Fourth Cause of Action is based on a claim that defendant
3 failed to “provide[] necessary information while processing the loan modification
4 application” (see FAC ¶ 124), it is subject to dismissal. Assuming, once again, defendant
5 owed plaintiff a duty to use reasonable care in processing the application, plaintiff fails to
6 allege any facts to support his conclusory assertion that defendant withheld “necessary
7 information” (see id.) from plaintiff. Cf. Lueras v. BAC Home Loan Servicing, LP, 221 Cal.
8 App. 4th 49, 68 (2013) (holding lender “owe[s] a duty to a borrower to not make material
9 misrepresentations about the status of an application for a loan modification”).

10 c. To the extent the Fourth Cause of Action is based on a claim that defendant
11 failed to “offer[] [p]laintiff a loan modification” (see FAC ¶ 124), it is subject to dismissal. A
12 lender “[does] not have a common law duty of care to offer, consider, or approve a loan
13 modification.” See Lueras, 221 Cal. App. 4th at 68.

14 **CONCLUSION**

15 For the reasons stated above, defendant’s motion is hereby GRANTED and the First
16 Amended Complaint is hereby DISMISSED. If plaintiff wishes to amend to cure the
17 deficiencies identified above, plaintiff shall file a Second Amended Complaint no later than
18 November 7, 2014. Plaintiff may not, however, add new claims, new plaintiffs or new
19 defendants without leave of court. See Fed. R. Civ. P. 15(a)(2).

20 **IT IS SO ORDERED.**

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22 Dated: October 20, 2014

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24 MAXINE M. CHESNEY
25 United States District Judge
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